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The Lemon Test: Should It Be Retained, Reformulated or Rejected?

Carl H. Esbeck
University of Missouri School of Law, esbeckc@missouri.edu

THE *LEMON* TEST: SHOULD IT BE RETAINED, REFORMULATED OR REJECTED?

CARL H. ESBECK*

The establishment clause severs the link between church and state, but it does not disassociate religion from government. Therein lies the seed of a problem, for in practice it has proven difficult to accomplish the desired separation of church and state without adversely affecting the manner in which religion is permitted to shape democratic government. Because the state has no competence in religious matters, government is prohibited from sanctioning any particular religion by codifying its confession of faith into civil law. On the other hand, when strict separationists, asserting the establishment clause, seek to protect the acts of state from "contamination" by religion, it discourages citizens from using their religious faith as the basis for political action and speech. At the level of individuals, this drives a wedge between the religionist's life as a citizen and his identity as a believer. On the level of political community, this leads to moral indirection and thus a less stable society.[1]

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* Professor of Law, University of Missouri-Columbia.

1. *See* Mittleman, *Toward a Postseparationist Public Philosophy: A Jewish Contribution*, 24 THIS WORLD 87, 98-99 (1989):

> As a defensive strategy, [strict] separationism neglects the task of recovering a free and democratic public life, sustained by the practical reasoning, public virtue, and dedication to the common good of the moral and spiritual communities. Although it guards the public square against domination by one or another set of symbols, it leaves the public square without symbol, bereft of moral principle and order other than that provided by the inherent structures of bureaucracy and technological pursuit.
>
> It forbids precisely those sources of meaning and value which inform the lives of moral and spiritual communities from entering into the realm which most requires guidance and direction. It lays both religion and the religious communities onto a Procrustean bed, for it construes religion as a kind of moralistic, privatistic intruder. Rather than grasp religion as a source of communal action, freedom and vision, it imagines religion as a bald set of do's and don'ts, alien in kind to a pluralistic public life. Religion's ability to shape a broad program of service is overlooked. Furthermore, the religious communities themselves are reduced to social problems vis-à-vis the general order. Whenever they seek to involve themselves in the

There is near-universal agreement that the establishment clause, working alongside the free exercise clause, has as its ultimate goal the protection of religious liberty. Moreover, most readily agree that this religious liberty obtains for the non-religious as well as the religious.[2] But when those professing no religion (and those holding their religion of only private consequence) maintain that the establishment clause assures them a government free from the influence of religion, the clash becomes manifest. The courts are seemingly presented with an irreconcilable choice between the duty of government to refrain from passing laws "respecting an establishment of religion" and the duty of government to refrain from inhibiting the free speech and political participation rights of those citizens promoting religious values as a basis for lawmaking.[3]

An apparent resolution is offered by conceding full first amendment rights of speech and political participation to those religious adherents who persist in inserting their beliefs into public debate. However, should these same citizens successfully sponsor a law coinciding with their religious values, then, it is argued, the church-state separation embodied in the establishment clause is violated. This makes little sense. Were that the legal effect of the first amendment, religious citizens would either be isolated from civic life or compelled to be barren in their political efforts. It is an argument that all religion is sepa-

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shaping of public policy, they are reduced to interest groups or dismissed for their lack of expertise.

2. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

3. It is too often forgotten that the Bill of Rights restrains only acts of government, not the actions of private citizens and organizations. Thus, for example, in the course of a debate over public policy, the free speech clause cannot be violated by a citizen's (or church's) speech having religious content. They are simply not "state actors." The Bill of Rights imposes duties only on government, including individuals acting within the scope of their official duties. Careless statements to the contrary are not uncommon. For example, work through the "vice versa" implications of this statement: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." Everson v. Board of Educ., 330 U.S. 1, 16 (1947). Or, consider what the following statement would mean for the church's tradition of social and political activism: "Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government." Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

It is understood, of course, that the establishment clause has application when religious citizens or organizations have co-opted the government and are using the instrumentalities of the state as a platform for advancing religion. In such an event, however, it is government (not the religious citizen or organization) that has breached its first amendment duty.

rated from public relevance. While these voters can participate fully in the political process as a matter of free speech, they can never win a debate because the legislation they promote out of reasons of faith transgresses the establishment clause.

This essay addresses the Supreme Court's three-part establishment clause test originally set down in *Lemon v. Kurtzman*.[4] Part I concerns the manner in which the *Lemon* test has substantially evolved. Part II explores what the evolved test has to offer by way of solving the seemingly conflicting duties not to inhibit free speech and political rights, while at the same time refraining from passing laws "respecting an establishment of religion." Finally, Part III addresses some of the proposals to supplant *Lemon* altogether.

I.

Although clinging to the shell of its doctrine, the three-part *Lemon* test has been materially altered by the Supreme Court since its promulgation in 1971. Because the lower federal courts and many commentators still begin their analysis of establishment clause cases with rote recitation of Chief Justice Burger's outline in *Lemon v. Kurtzman* of the purpose, effect, and entanglement formulation of the test,[5] apparently the shift in how these three elements are applied is not fully recognized. Accordingly, what follows is a brief review of the important alterations in how the Court applies the *Lemon* doctrine.

A. *The "Purpose" Prong*

To survive establishment clause analysis, a statute must have, according to the first of the three requirements laid down in *Lemon*, a "secular legislative purpose." This original test has now been, in significant respects, inverted. Currently, the Supreme Court will invalidate legislation under *Lemon*'s first prong "only if it is motivated wholly by an impermissible purpose,"[6] or only when it can be said that the law's "pre-eminent

4. 403 U.S. 602 (1971).

5. Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13 (citations omitted).

6. Bowen v. Kendrick, 108 S. Ct. 2562, 2570 (1988); *see* Lynch v.

purpose . . . is plainly religious in nature."[7] Conversely, the Court has said that "a statute that is motivated in part by a religious purpose" does not violate the purpose prong,[8] nor is it required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious groups."[9] As reformulated, then, the proper inquiry is whether the sole purpose of the law is to advance religion. When government acts either out of reasons that are arguably secular, or with mixed secular and religious purposes, the first prong of *Lemon* is not violated.[10]

The reasons why the Court softened the rigor of the purpose element in *Lemon* seem to be four-fold: (1) the difficulty in reliably determining the subjective motivation behind an enactment that is the product of a complex legislative process; (2) the impropriety of the judicial branch deeply probing the inner workings of the legislative branch; (3) the disutility of invalidating a good law that would be constitutional but for an impermissible legislative motive; and (4) the futility of invalidating a law that would be constitutional but for an impermissible legislative motive, when the law is likely to be re-enacted "cleansed" of improper motive. Indeed, for these collective reasons, and others, two members of the current Supreme Court would abandon the purpose prong altogether.[11]

Donnelly, 465 U.S. 668, 680 (1984) ("motivated wholly by religious considerations").

7. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam); *see also* Edwards v. Aguillard, 482 U.S. 578, 590 (1987) ("preeminent religious purpose"); *id.* 605 ("interference with the decisions of these authorities [school boards] is warranted only when the purpose for their decisions is *clearly religious*") (Powell, J., concurring) (emphasis added).

8. Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

9. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (citation omitted).

10. *See* Carter v. Broadlawns Medical Center, 857 F.2d 448, 454 (8th Cir. 1988) (upholding employment of Church of Christ deacon as chaplain by county hospital to counsel patients, outpatients and relatives, notwithstanding mixed secular and religious purpose), *cert. denied*, 109 S. Ct. 1569 (1989).

This shift in the purpose prong anticipates criticism in *The Williamsburg Charter* 16 (1988):

> Words such as *public*, *secular* and *religious* should be free from discriminatory bias. "Secular purpose," for example, should not mean "non-religious purpose" but "general public purpose." Otherwise, the impression is gained that "public is equivalent to secular; religion is equivalent to private." Such equations are neither accurate nor just.

11. *See* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J.,

Because of the difficulty in determining lawmakers' true motives for enacting a statute or adopting a particular policy, the Court has avoided making motive-analysis part of legal doctrine in areas of constitutional law other than church-state relations.[12] With the establishment clause, while not abandoning motive-analysis altogether,[13] the Court has adopted a highly deferential inquiry. When a plausible non-religious purpose appears on the face of the challenged statute or regulation,[14] the Court is inclined summarily to announce the element satisfied and move quickly on to the second and third prongs of *Lemon*.[15]

A sensitivity to courts remaining within the defined authority of the judicial branch was stated very pointedly by Justice O'Connor in *Wallace v. Jaffree*,[16] where she said the inquiry into impermissible purpose must be "deferential and limited,"

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dissenting); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

12. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into Congressional motives or purpose are a hazardous matter").

13. *Compare* McGowan v. Maryland, 366 U.S. 420, 466, 468-69 (1961) (Frankfurter, J., concurring in the judgment) *with* McDaniel v. Paty, 435 U.S. 618, 636 n.9 (1978) (Brennan, J., concurring in the judgment).

14. Justice Scalia helpfully distinguished "purpose" from "motive" as follows:

> For while it is possible to discern the objective "purpose" of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where it is explicitly set forth . . ., discerning the subjective motivation of those enacting the statute is, to be honest, an impossible task.

Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

15. The Supreme Court has in most cases easily found a permissible purpose for a law in the statute's language, its legislative history, or simply by exercising common sense. This approach was acceded to by the dissenting justices in Bowen v. Kendrick, 108 S. Ct. 2562, 2587 (1988), where Justice Blackmun stated: "As is often the case, it is the effect of the statute, rather than its purpose, that creates Establishment Clause problems. . . . I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose."

16. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring). *See also* Mueller v. Allen, 463 U.S. 388, 394-95 (1983) (upholding Minnesota tuition tax deduction for parents of school-aged children, including parochial students), where, concerning the deferential application of the purpose prong in *Lemon*, the Supreme Court said: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

because "a court has no license to psychoanalyze the legislators."[17] It would be unseemly for courts to engage in the business of conducting a virtual Testimonial Inquisition—summoning to the witness stand and probing in open court the religious tenets, values, and subjective motivations of the relevant lawmakers. As Justice Brennan succinctly stated the matter in *McDaniel v. Paty*:[18]

> Government may not inquire into the religious beliefs and motivations of officeholders—it may not remove them from office for merely making public statements regarding religion, or question whether their legislative actions stem from religious conviction.

Indeed, there is a line of Supreme Court cases holding that judges are to avoid inquiries into legislative motivation, and especially to avoid placing lawmakers on the witness stand to be interrogated as to their motivations back at the time a statute or regulation was debated and adopted.[19] Moreover, there is an additional line of Supreme Court cases requiring avoidance of inquiries into the significance of religious beliefs and practices of individuals and their denomination, including, presumably, those of the relevant lawmakers.[20]

This highly deferential approach can be seen at work in the Supreme Court's parochial aid cases. Obviously, state programs to aid parochial schools would never be enacted were it not for the concerted efforts of religious leaders, their lobbyists, and parochial school parents brought to bear on elected

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17. 472 U.S. at 74. *See also* Justice Frankfurter's concurring opinion in McGowan v. Maryland, 366 U.S. 420, 466 (1961) ("To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted.").

18. 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment) (citation omitted).

19. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161, 176 n.16 (1981); Village of Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252, 268 n.18 (1977); United States v. Morgan, 313 U.S. 409, 422 (1941); *cf.* McGowan v. Maryland, 366 U.S. 420, 469 (1961) (Frankfurter, J., concurring in the judgment). *See also* Discount Records v. City of North Little Rock, 671 F.2d 1220, 1222 (8th Cir. 1982).

20. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (inappropriate to have NLRB second guessing whether religious reasons given by religious authorities are sincere); Serbian Eastern Orthodox v. Milivojevich, 426 U.S. 696 (1976) (no judicial review of dispute concerning meaning of church rules and doctrine); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (avoid entanglement with church authorities); United States v. Ballard, 322 U.S. 78 (1944) (courts cannot challenge the truth or falsity of a religious claim, only assess its sincerity).

representatives. Nevertheless, the Court repeatedly finds such legislation surviving the purpose prong of *Lemon*.[21] Of course, that is not to say that state aid to parochial schools is consistent with the establishment clause, and indeed the Court to date has invalidated most forms of aid to independent religious schools.[22] The point here is that these cases were decided under the effect and entanglement prongs, not the purpose prong.

Justice O'Connor's concurring opinion in *Wallace v. Jaffree*[23] is the most detailed discussion by any member of the Court concerning the limit to which courts should defer to a legislature's profession of a nonreligious purpose. In *Jaffree*, a majority of justices said that they would sustain the constitutionality of a moment-of-silence to begin each public school day.[24] However, in defiance of *Engel v. Vitale*,[25] Alabama

21. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977); Meek v. Pittenger, 421 U.S. 349, 363 (1975); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

22. At both the primary and secondary school levels, as a general rule the Supreme Court has invalidated public aid to religious schools in the form of direct monetary transfers and aid in the form of equipment, services, or reimbursement for same where the equipment or services could possibly be diverted to a sectarian use. Thus, the Court struck down government aid in Aguilar v. Felton, 473 U.S. 402 (1985) (public school teachers providing remedial education and attendant materials at religious school campus); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (public instructional equipment); Meek v. Pittenger, 421 U.S. 349 (1975) (counseling and special education services provided at religious school campus; loan of instructional equipment); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (grants for building maintenance; tuition grants to parents; tuition tax credits); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursement); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973) (reimbursement for cost of teacher-prepared testing and record keeping required by law); Lemon v. Kurtzman, 403 U.S. 602 (1971) (teacher salary supplement; cash reimbursement for textbooks).

The Supreme Court has upheld state aid to primary and secondary religious schools in Mueller v. Allen, 463 U.S. 388 (1983) (tuition tax deductions); Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980) (subsidy for state-prepared testing and record keeping required by law); Wolman v. Walter, 433 U.S. 229 (1977) (textbooks; standardized tests and scoring services; diagnostic services on campus with therapeutic services to follow off-campus if indicated); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of textbooks); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (school bus transportation).

23. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

24. Chief Justice Burger and Justices O'Connor, Powell, White, and Rehnquist indicated that they would uphold a moment-of-silence law untainted by an impermissible purpose. *Id.* at 62 (Powell, J., concurring); *id.* at 67 (O'Connor, J., concurring); *id.* at 85 (Burger, C.J., dissenting); *id.* at 90 (White, J., dissenting); *id* at 91 (Rehnquist, J., dissenting).

lawmakers readily conceded that their purpose was to re-introduce prayer in the public schools.[26] Consequently, the purpose was pre-eminently religious, and thus violative of the establishment clause. Justice O'Connor formulated the deferential purpose inquiry as follows:

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.[27]

Thus, application of the purpose prong will only rarely result in invalidation of statutes or administrative regulations. Nonetheless, the deferential purpose inquiry does make an important contribution to religious liberty. A lawmaking body cannot overtly manifest a religious purpose, thus alienating religious minorities or others from their government. Should lawmakers evince a nonreligious purpose on the face of a law, and in its legislative history, and should such prefatory language not be a transparent sham, the purpose element is satisfied. By limiting its purpose inquiry to facial analysis, the official legislative record, and settled administrative interpretation, Justice O'Connor's deferential approach may spawn disingenuous actions by lawmakers to hide their true motives by "sanitizing" the official record. But even this consequence serves the laudatory purpose of forcing government to give the appearance of having only permissible motives. And of course, the effect and entanglement prongs of the *Lemon* test could still serve to invalidate the legislation.

Establishment clause challenges over statutes, regulations, written policies, and the like—all products of deliberative lawmaking bodies—should be distinguished from lawsuits concerning the discretionary acts of government employees. The distinction is illustrated by the recent case of *Roberts v. Madigan.*[28] Kenneth Roberts, a fifth grade public school teacher, was found to have a religious purpose in placing two Christian books (*The Bible in Pictures* and *The Life of Jesus*) in his in-classroom library, in silently reading a Bible at his desk in view of

25. 370 U.S. 421 (1962) (striking down public school prayer).

26. *Jaffree*, 472 U.S. at 43; *id.* at 67 (O'Connor, J., concurring).

27. *Id.* at 75.

28. 702 F. Supp. 1505 (D. Colo. 1989) (denying preliminary injunctive relief to classroom teacher).

the students during free-reading curricular hours, and in placing a religious poster in his classroom.[29] If it is correct, as the court found, that the teacher's motive was to bootleg evangelical Christianity into the classroom, this seems an entirely correct—but distinguishable—application of the purpose prong. None of the problems noted earlier—difficulty, propriety, disutility, or futility—attend a vigorous application of *Lemon*'s purpose prong when the lawsuit challenges discretionary acts of government employees.

B. *The "Effect" Prong*

Lemon's second prong required that the "principal or primary effect" of a law or governmental policy "must be one that neither advances nor inhibits religion." Conversely, the Supreme Court has sustained the constitutionality of laws that have only an incidental or *de minimis* effect of advancing religion.[30] When religion is materially advanced by a law, albeit

29. *Id.* at 1515. The court also found that the school's removal of the Bible from the main school library was improper, and ordered officials to replace it. *Id.* at 1512-13.

30. *See* Bowen v. Kendrick, 108 S. Ct. 2562 (1988) (federal law promoting teenage chastity and discouraging abortion and premarital sex; funding counselors, including those with religious affiliation, and permitting grantees to involve religious organizations in promoting traditional family values); Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (federal civil rights act concerning non-discrimination in employment exempting from its sweep religious employers as to both religious and secular jobs); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (state vocational rehabilitation funding for blind person to attend Bible school for training in career as pastor, missionary or youth director); Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (municipal Christmas display, including scene depicting nativity of Christ, is "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the holiday itself as Christ's Mass, or the exhibition of literally hundreds of religious paintings in governmentally supported museums."); Marsh v. Chambers, 463 U.S. 783 (1983) (government-paid Presbyterian minister employed for 16 years as state legislative chaplain); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota income tax deduction for tuition and expenses paid by parochial school parents); Widmar v. Vincent, 454 U.S. 263 (1981) (freedom of speech and assembly rights require state university to afford equal access to student religious groups, and such utilization of government facilities has no religious effect other than "incidental"); Harris v. McRae, 448 U.S. 297 (1980) (federal Hyde Amendment banning funding of abortions); Hunt v. McNair, 413 U.S. 734 (1973) (state bonds to construct church-related college facilities); Tilton v. Richardson, 403 U.S. 672 (1971) (direct federal aid to church-related colleges and universities in the form of grants for constructing buildings); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for churches and other religious organizations); Board of Educ. v. Allen, 392 U.S. 236 (1968) (state provision of secular

unintentionally, presumably the effect or impact would be apparent from the day-to-day operation of the law. That is, in a straightforward application of an effect test there would have to be measurable, palpable evidence that a religion (or religion generally) is advanced. In its application of the test, however, the Court has not always proceeded so forthrightly.

In certain cases the Court has been willing to infer or assume that the impact of challenged legislation would be to advance religion materially. This, of course, gives the effect prong a pre-emptive strike capability. If no actual advancement of religion has to be shown, the mere presence of such a hazard being sufficient,[31] it is not a true impact test. Further, this state of affairs was not unrelated to the Court's adding as a third prong to *Lemon* the entanglement test. The effect and entanglement elements worked together to ensure that nearly all state aid to parochial schools violated the establishment clause. If the legislation did not carefully police the parochial school to ensure that government funds were not used to advance religion, it was assumed the law would have that effect. On the other hand, if adequate administrative controls were in place to ensure that government monies were used only for permissible purposes, the legislation excessively entangled religious school authorities with state auditing regulations and personnel. Parochial school legislation could be struck down even before the law's effective date, rather than having to wait several months for evidence to mount that the funding was having a measurable impact on the advancement of religion. In tandem, the effect and entanglement prongs worked as an abortifacient ensuring that few state-conceived programs survived litigation.

An important limiting feature of this pre-emptive strike effect prong was that the Catch-22 applied only when the benefited institutions were "pervasively sectarian."[32] The definition of a "pervasively sectarian" institution was stated in general

textbooks for use in parochial schools); United States v. Seeger, 380 U.S. 163 (1965) (Selective Service System exemption for religious objectors to military service); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday "blue law" legislation); Zorach v. Clauson, 343 U.S. 306 (1952) (release-time program so children may obtain religious training off public school campus); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement to parents of parochial school children for expense of bus transportation).

31. *See* Grand Rapids School Dist. v. Ball, 473 U.S. 373, 385, 387 (1985); Wolman v. Walter, 433 U.S. 229, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 370, 372 (1975); Levitt v. Committee for Pub. Educ., 413 U.S. 472, 480 (1973); *cf.* Bowen v. Kendrick, 108 S. Ct. 2562, 2575 (1988).

32. Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 760-761

terms,[33] but only church-affiliated primary and secondary schools have ever been found by the Supreme Court to fit the profile. (Presumably, a church, synagogue, or mosque would also be regarded as "pervasively sectarian.") So long as challenged legislation did not involve a "pervasively sectarian" institution, the effect prong of *Lemon* had no pre-emptive capa-

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(1976) (plurality opinion); Tilton v. Richardson, 403 U.S. 672, 682 (1971); *cf.* Bowen v. Kendrick, 108 S. Ct. 2562, 2576 (1988).

33. Roemer v. Board of Pub. Works, 426 U.S. 736, 758 (1976) (plurality opinion). In *Roemer*, the Supreme Court turned back a challenge to the constitutionality of a state funding program that afforded noncategorical grants to eligible colleges and universities, including sectarian institutions that awarded more than just seminarian or theological degrees. In discussion focused on the fostering of religion, the Supreme Court said:

> [T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. Hunt [v. McNair, 413 U.S. 734 (1973)] requires (1) that no state aid at all go to institutions that are so "pervasively sectarian" that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded.

Roemer, 426 U.S. at 755 (emphasis in original).

The Baptist college in *Hunt* and the Roman Catholic colleges in *Roemer* were held not to be "pervasively sectarian." The record in *Roemer* supported findings that the institutions employed chaplains who held worship services on campus, taught mandatory religious classes, and started some classes with prayer. However, there was a high degree of autonomy from the Roman Catholic Church, the faculty was not hired on a religious basis and had complete academic freedom except in religious classes, and students were chosen without regard to their religion. The challenged state aid in *Hunt* was for the construction of secular college facilities. The legislation granted the authority to issue revenue bonds. The Court upheld the legislation, commenting on the primary-effect test:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.

Hunt, 413 U.S. at 743

A comparison of the colleges in *Roemer* and *Hunt* with the elementary and secondary schools in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 767-768 (1973), will help to clarify the term "pervasively religious." The parochial schools in *Nyquist*, found to be pervasively religious, conformed to the following profile: the schools placed religious restrictions on student admissions and faculty appointments, they enforced obedience to religious dogma, they required attendance at religious services, they required religious or doctrinal study, the schools were an integral part of the religious mission of the sponsoring church, they had religious indoctrination as a primary purpose, and they imposed religious restrictions on how and what the faculty could teach. The state aid in *Nyquist* was held to be prohibited by the establishment clause.

bility, and thus the Court still required measurable, palpable evidence that religion was materially advanced.

To see this in operation, consider the Supreme Court's statement in *Corporation of Presiding Bishop v. Amos*,[34] upholding an exemption in a civil rights law for religious employers where the discrimination is on the basis of religion. The Court refused to find the exemption violated the effect prong because there was "no persuasive evidence in the record . . . that the Church's ability to propagate its religious doctrine through the Gymnasium [operated by the Church] is any greater now than it was prior to the passage of the Civil Rights Act of 1964."[35] Likewise, in *Widmar v. Vincent*,[36] the Court held that it would not be violative of the establishment clause to give student religious organizations equal access to meeting facilities at a state university campus. The Court insisted that evidence was required before it would find a religious impact: "[I]n the absence of empirical evidence that religious groups will dominate [the university's] open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect.' "[37]

The possibilities for exploiting the foregoing distinction became more evident following *Bowen v. Kendrick*, the most important establishment clause case from the Court's 1987-88 Term. One of the many interesting aspects of *Kendrick* is that the majority was unwilling to find that church-affiliated teenage counseling centers were "pervasively sectarian."[38] Thus, the Court turned back the facial challenge to the legislation insofar as the claim was based on the assumption that the counseling of adolescents by religious agencies concerning teen sexuality, pregnancy, and abortion could not be conducted in a nonreligious context. After *Kendrick*, it is quite possible that the Court will find no categorically "pervasively sectarian" organizations other than parochial schools.[39] If this happens, then establish-

34. 483 U.S. 327 (1987).

35. *Id.* 337.

36. 454 U.S. 263 (1981).

37. *Id.* at 275. *But cf.* Mueller v. Allen, 463 U.S. 388 (1983), upholding state income tax deduction for tuition and other expenses incurred by parents of school children. Over 90% of the tax benefits were realized by parents enrolling their children in parochial schools. Accordingly, *Mueller* has to be explained by the "facial-neutrality, private-choice" variation. *See infra* notes 40-47 and accompanying text.

38. Bowen v. Kendrick, 108 S. Ct. 2562, 2574-76, 2578, 2580 (1988).

39. Indeed, Justice Kennedy, joined by Justice Scalia, indicated that he would drain the category "pervasively sectarian" of nearly all meaning. *Id.* at 2582 (Kennedy, J., concurring).

ment clause challenges to funding legislation (other than funding for parochial schools) will have to be challenged on an "as applied" basis. This, of course, puts a considerable burden on church-state separationists—at least insofar as they rely upon the effect prong of *Lemon*—for their agenda can be advanced in the courts only on a piecemeal, case-by-case basis. Henceforth, a violation of the effect prong must be buttressed by substantial evidence that religion is being advanced—the only exception being the "pervasively sectarian" church-affiliated schools.

Another interesting shift occurring under the effect prong of *Lemon* is the emergence of a "facial-neutrality, private-choice" variation. The Court has been unwilling to find impermissible effects where the challenged legislation merely empowers students, parents, or taxpayers to advance their independently chosen religious objectives. *Mueller v. Allen*[40] is especially instructive on this variant of the effect test. A 5 to 4 majority in *Mueller* upheld a Minnesota income tax deduction for tuition and other expenses incurred by parents of primary and secondary students, including parochial school students. Challengers to the Minnesota tax law had ample documentation in the record that the vast majority of the beneficiaries of the tax deduction were parochial school parents.[41] Nonetheless, Justice Rehnquist (now Chief Justice) brushed aside this evidence of religious impact.

> It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children. . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of State approval" can be deemed to have been conferred on any particular religion, or on religion generally.[42]

The same "facial-neutrality, private-choice" variant of the effect test is embodied in *Witters v. Washington Department of Services for the Blind*,[43] where the Court upheld a state vocational

40. 463 U.S. 388 (1983).

41. *Id.* at 408-11 (Marshall, J., dissenting) (over 90% of tuition-charging schools were religious and approximately 96% of taxpayers eligible for deduction enrolled children in religious schools).

42. *Id.* at 399 (citation omitted).

43. 474 U.S. 481 (1986).

rehabilitation program as applied to a blind student who chose to apply his benefits to attending a Bible school in pursuit of a career as a pastor, missionary, or church youth director.

Widmar v. Vincent[44] is also supportive of this "facial-neutrality, private-choice" variant. In *Widmar*, the Court held that merely because some university students, prompted by their own interests and motivations, might utilize state property to advance religious interests, it did not follow that the university as custodian of the property was violating the establishment clause.[45]

The "facial-neutrality, private-choice" variant on *Lemon*'s effect analysis presumably would sustain two widely used federal income tax benefits. Federal income tax deductions are provided to those making charitable contributions, including donations to religious organizations.[46] A tax credit is available for child-care expenses of two-paycheck families, including families who select a church-operated preschool to provide early-childhood education.[47] This variant would also permit voucher plans for preschool funding, as well as primary and secondary education.

It would appear that the "facial-neutrality, private-choice" variant is the Supreme Court's adjustment to modernity. Before the enormous growth in government-operated social programs, the Court could, in a practical sense, have insisted on strict separationism—the state having little to do with religious organizations beyond provision of police and fire protection. With the arrival of the modern welfare and regulatory state, to exclude only religious organizations from participation in the delivery of the benefits of social programs appears dis-

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44. 454 U.S. 263 (1981).

45. *Id.* at 271-72 n.10, 274 n.14. The result—although not the rationale—in Everson v. Board of Educ., 330 U.S. 1 (1947), is supportive of the "facial-neutrality, private-choice" reading of the effect test. *Everson* upheld the constitutionality of governmental reimbursement of municipal bus fare paid by the parents of school-age children. The benefit was available to parents of both public and parochial school children. *See also* Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding the loaning of secular textbooks to students in grades seven through twelve, including students in sectarian and nonsectarian private schools). *But see* Zorach v. Clauson, 343 U.S. 306 (1952), where the Court upheld a program for off-campus release time from public school to attend religious education classes. Participation was voluntary and required written parental permission. However, the program was not facially neutral, as release time was available only to attend religious classes.

46. I.R.C. § 170 (West Supp. 1989).

47. I.R.C. § 21 (West Supp. 1989).

criminatory, and, for some, evidences official hostility toward religion. But directly funding religious organizations can have the effect of advancing religion and inevitably fosters administrative entanglements. The "facial-neutrality, private-choice" variation has the effect of indirectly benefiting religion. However, it does so only through numerous individual, voluntary decisions by students, parents, and taxpayers to "spend" their social welfare entitlements at the religious program that has gained their loyalty. Moreover, institutional involvement between church and state is minimal or nonexistent. Strict separationist theory, therefore, is jettisoned under this variant, and replaced by an institutional separation of church and state.

Growth in government social programs has been followed by an emerging regulatory state. This regulation has forced a decision over application of the effect prong of *Lemon* to religious exemptions from generally applicable regulatory legislation. If a religious exemption is provided to avoid administrative entanglement between church and state, religious organizations are relieved from regulatory duties imposed on all others—even when the exemption is not required by the free exercise clause. Nevertheless, the Court has found that these exemptions do not violate the establishment clause. While entanglement-avoidance exemptions started with *Walz v. Tax Commission*,[48] the recent case of *Corporation of Presiding Bishop v. Amos*[49] secured its position in effect prong analysis. Title VII of the Civil Rights Act of 1964, as amended in 1972, exempted religious organizations from the requirement that employers not discriminate on the basis of religion. Finding that the effect prong was not violated, the Court in *Amos* said:

> [R]eligious groups have been better able to advance their purposes on account of many laws that had passed constitutional muster. . . . A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose.[50]

The same analysis underlies *NLRB v. Catholic Bishop*.[51] While clearly raising the establishment clauses issue—for the broad language in the National Labor Relations Act included religious schools within its scope—the Court in *Catholic Bishop* dodged the constitutional issue by fashioning a new rule of

48. 397 U.S. 664 (1970).
49. 483 U.S. 327 (1987).
50. *Id.* at 336-37.
51. 440 U.S. 490 (1979).

statutory construction. Pointing to the high stakes of an explicit first amendment ruling, the Court held that it would not assume that Congress intended to regulate parochial schools unless it specifically stated the intent to include them in the Act. *Catholic Bishop* suggests that the prospect of National Labor Relations Board jurisdiction over lay parochial school teachers poses "difficult and sensitive questions" and "a significant risk"[52] that regulation can have the primary effect of inhibiting religion, contrary to the second prong of *Lemon*. Statutory exemptions to avoid such regulation, accordingly, do not have the impermissible effect of advancing religion.

C. *The "Entanglement" Prong*

Initially, the third prong of *Lemon* required an examination concerning whether the law in question fostered[53] (1) excessive administrative entanglement between church and state, or (2) political divisiveness along religious lines. The Court's scrutiny of entanglement between religious groups and agencies of government appears to retain its bite.[54] However, the political divisiveness element is now repudiated by a majority of the Court. This occurred in two ways. First, it was said that political divisiveness analysis is to be applied only in parochial school cases.[55] Second, and more tellingly, it was said that evidence of political divisiveness cannot alone serve to invalidate otherwise lawful conduct.[56] Unless, therefore, there is a showing of excessive administrative entanglement, or unless the purpose or effect prongs of *Lemon* are violated, an allegation of political divisiveness along religious lines does not state a claim

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52. *Id.* at 502, 507.

53. In Bowen v. Kendrick, 108 S. Ct. 2562, 2570 (1988), Chief Justice Rehnquist stated that, under *Lemon*, "a court may invalidate a statute if it *requires* excessive entanglement between church and state." (emphasis added). It is not clear whether this change, which narrows the third prong of *Lemon*, was intentional.

54. *See infra* text accompanying notes 62-71.

55. Bowen v. Kendrick, 108 S. Ct. 2562, 2578 n.14 (1988); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 339 n.17 (1987) (citing Mueller v. Allen, 463 U.S. 388, 404 n.11 (1983)).

56. Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 339 n.17 (1987); Lynch v. Donnelly, 465 U.S. 668, 684 (1984); Mueller v. Allen 463 U.S. 388, 403-04 n.11 (1983). This is a repudiation of Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971); *see also* Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring and dissenting); *id.* at 258-59 (Marshall, J., concurring and dissenting); Meek v. Pittenger, 421 U.S. 349, 374-77 (1975) (Brennan, J., concurring and dissenting).

for which relief can be granted. Thus, political divisiveness is no longer an element in its own right of the *Lemon* test.

Before its recent repudiation, political divisiveness analysis was heavily criticized[57] because it ran counter to the Court's recognition in *Walz v. Tax Commission*[58] that censorship on the basis of religious content severely infringes free speech and political participation rights protected by the first amendment.[59]

Some clarity regarding political divisiveness inquiry emerged in *Lynch v. Donnelly*, when Chief Justice Burger noted that "[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement,"[60] and Justice O'Connor added that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."[61] Even admitting into evidence acts of political divisiveness in establishment clause litigation will work to chill the speech and political activity of religionists. If we take freedom of speech seriously, we should not mourn the passing of political divisiveness as a separate element of the *Lemon* test.

Concerning excessive administrative entanglement (better termed "institutional encroachment"), the Supreme Court's entanglement-avoidance analysis is most easily seen in parochial aid decisions. While the result in many of these cases is the invalidation of state funding plans that directly aid paro-

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57. *See* Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

58. 397 U.S. 664 (1970).

59. Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.

Id. at 670. As suggested by *Walz*, the religious community cannot be excluded from the common discourse where organized religion along with others articulate their values, visions, and hopes. The premise that religion should be excluded because it is controversial or because opinions about religion are not held mildly is anomalous. When broadly applied, the test amounts to censorship by precluding public debate on certain subjects by the religious community. Reconciling the political divisiveness standard, which the Court has persisted in repeating in the past (*see, e.g.*, Larson v. Valente, 102 S. Ct. 1673, 1688 (1982)), with the desired robust freedom of speech for all, including religious groups, does not seem possible.

60. Lynch v. Donnelly, 465 U.S. 668, 684-85 (1984).

61. *Id.* at 689 (O'Connor, J., concurring).

chial schools, the language of the Court often states a rationale of *protecting* the religious schools, not preventing their advancement. For example, in *Lemon*, the Court emphasized that the religious clauses' "objective is to prevent . . . the intrusion of *either* [state or religion] *into the precincts of the other*."[62]

The 1986 *Aguilar v. Felton*[63] decision is the Court's most recent decision on entanglement in independent religious schools. *Aguilar* struck down a federal education program that paid the salaries of public school employees who taught low-income, educationally deprived children enrolled in public or private schools. In order to insure that public funds not aid religion, the educational law mandated a system of monitoring in the parochial schools. While serving to avoid aiding religion, however, the monitoring created an unconstitutional permanent and pervasive state presence in the sectarian schools receiving the aid. The prohibition on excessive entanglement was said to be rooted on two concerns: freedom of religious belief for those not aided by the state, and an equal concern to safeguard "the freedom of even the adherents of the denomination [supported by the law from being] limited by the governmental intrusion into sacred matters." The Court in *Aguilar* thus reiterated that the church-state separation embodied in the establishment clause is for the mutual benefit of both the religious schools (who ironically, for their own good, are denied the aid they seek) and the state's citizens.

Outside the context of aid to parochial schools, *Gillette v. United States*[64] presents a classic example of the entanglement concept used to avoid the involvement of government in difficult classifications of religious concerns. The petitioners in *Gillette* claimed that limiting the statutory exemption from conscription to those who objected to all wars violated the establishment clause because the exemption discriminated against religious faiths that permitted fighting only in "just wars." The Court rejected the argument, noting that the "petitioners ask for greater 'entanglement' by judicial expansion of the exemption to cover objectors to particular wars."[65] The Court reasoned that "the more discriminating and complicated the basis of classification for an exemption . . . the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] govern-

62. 403 U.S. 602, 614 (1971) (emphasis added).
63. 473 U.S. 402 (1985).
64. 401 U.S. 437 (1971).
65. *Id.* at 450.

ment in difficult classifications of what is or is not religious," or what is and is not conscientious belief.[66]

The recurring themes of avoiding government involvement in classifying religious practices and avoiding the monitoring of religious ministries were brought together in *Widmar v. Vincent*.[67] Although permitting use of buildings and other facilities by student groups, the state university in *Widmar* sought to bar use by student groups that had a religious purpose. On the basis of speech and associational freedoms, the Court upheld the right of student groups with a religious focus to use university facilities on an equal basis with all other student groups.[68] The lone dissenter, Justice White, argued that the establishment clause permitted the university to deny use of its facilities for "religious worship," although he agreed that "religious speech" could not be excluded based on the Court's precedents prohibiting content-based censorship.[69] The majority rejected this suggested distinction between "worship" and "religious speech" on entanglement-avoidance grounds. The Court pointed out that the distinction would (1) compel the state university "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith,"[70] and (2) foster "a continuing need to monitor group meetings to ensure compliance with the rule."[71]

II.

A legal principle that threads its way throughout the purpose and effect prongs of the *Lemon* test is that the statute or governmental policy being challenged as violative of the estab-

66. *Id.* at 457 (citations omitted). "While the danger of erratic decisionmaking unfortunately exists in any system of conscription that takes individual differences into account, no doubt the dangers would be enhanced if a conscientious objection of indeterminate scope were honored in theory." *Id.* at 458. *See* Hernandez v. Commissioner, 109 S. Ct. 2136 (1989) (sustaining, for reasons of entanglement-avoidance, IRS's refusal to differentiate between "religious" and "secular" benefit to taxpayer purchasing a service offered by a church, for purposes of allowing claimed tax deductible contribution); Bob Jones University v. United States, 461 U.S. 574, 604 n.30 (1983) (entanglement avoided when tax exemption denied to all schools on facially neutral basis regardless of whether or not racial policies had a religious motive).

67. 454 U.S. 263 (1981).

68. *Id.* at 277.

69. *Id.* at 283-86 (White, J., dissenting).

70. *Id.* at 269-70 n.6.

71. *Id.* at 272 n.11.

lishment clause will be given closer scrutiny if it is "inherently religious,"[72] "plainly religious in nature,"[73] or of a "pervading religious character."[74] The Supreme Court has distinguished between laws that promote "religion" in a conventional sense of the term,[75] from laws that have a basis in general morality, even when religion contributed to the moral foundation that gave rise to the law. For ease of reference, this legal principle will be called the "inherently religious analysis" of the Court.

At the outset, it should be emphasized that the inherently religious analysis has *not* supplanted the *Lemon* test. If a challenged law or governmental policy is not inherently religious, in the sense explained, it may still fail the three-prong *Lemon* test.[76] Likewise, when a governmental policy or law is inherently religious, it is still possible that it can survive *Lemon* analysis.[77] What does appear to be happening with the Court's inherently religious analysis, is that the rigor of the purpose and effect prongs of the *Lemon* test are materially stiffened or relaxed, as the case may be, depending on whether the challenged statute is or is not "inherently religious." This is most interesting, for the inherently religious analysis is one of the ways the Court has kept the establishment clause from inhibiting free speech,[78] and the analysis also enables the Court to avoid the two-definitions-of-religion problem.[79]

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72. Bowen v. Kendrick, 108 S. Ct. 2562, 2572 (1988).

73. Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

74. Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963).

75. On this understanding, "religion" is limited, in an epistemological sense, to belief systems that affirm the existence of God or gods.

76. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 72-73 (1985) (O'Connor, J., concurring) ("A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. . . . [A] moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.").

77. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (a scene depicting the nativity of Jesus Christ, a matter inherently religious, is nonetheless not violative of the establishment clause where the scene is only a part of a much larger holiday display); March v. Chambers, 463 U.S. 783 (1983), (daily prayers offered before a state legislature, a matter inherently religious, is nonetheless constitutional because of a similar practice being conducted by the First Congress).

78. *See supra* text accompanying notes 1-3 and *infra* notes 115-17.

79. *See infra* text accompanying notes 103-14.

A. *The Inherently Religious Analysis*

Consider the Supreme Court's recent pronouncement concerning the establishment clause in *Bowen v. Kendrick*,[80] a decision upholding the Adolescent Family Life Act (AFLA) which authorizes federal grants to public and private organizations for counseling on premarital adolescent sexual relations, contraception, and pregnancy. In analyzing the effect of the AFLA under *Lemon*'s second prong, the *Kendrick* Court said:

> The services to be provided under the AFLA are not *religious in character*. . . . [I]t is clear that the AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy—for example, two of its stated purposes are to "promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations . . ." and to "promote adoption as an alternative . . ." [B]ut again, that approach is not *inherently religious*, although it may coincide with the approach taken by certain religions.[81]

The Court further stated:

> The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care . . . are not themselves "*specifically religious activities*," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.[82]

Thus, the Court's examination was less scrutinizing because the AFLA was not "religious in character," not "inherently religious," and did not fund "specifically religious activities."

Even the dissenting justices agreed that establishment clause analysis requires line-drawing between "secular values" and matters of a "religious nature." Thus in his dissent, Justice Blackmun said:

> Whereas there may be *secular values* promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a *religious nature*.[83]

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80. 108 S. Ct. 2562 (1988).
81. *Id.* at 2572 (emphasis added).
82. *Id.* at 2576 (emphasis added).
83. *Id.* at 2590 (emphasis added).

Justice Blackmun contended that courts must examine the context in which the law actually operates. But the dissenting Justices agreed with the majority that in isolation the AFLA was not of a religious nature; in other words, that the AFLA was not "inherently religious." The Supreme Court was unanimous, then, that in applying *Lemon* a distinction must be drawn between laws based in general morality and laws that are intrinsically religious, *i.e.* conventionally regarded as specifically theistic in character.

Likewise, in *Stone v. Graham*, [84] the Court, in analyzing legislative purpose under the first prong of *Lemon*, stated:

> The pre-eminent purpose of posting the Ten Commandments on schoolroom walls is *plainly religious in nature*. The Ten Commandments are *undeniably a sacred text* in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to *arguably secular matters*, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the *religious duties of believers*: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day. See Exodus 20:1-11; Deuteronomy 5:6-15.[85]

Again, in *Abington School District v. Schempp*,[86] the Court, in analyzing the purpose of a longstanding public school practice, stated: "Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the *pervading religious character* of the ceremony is evident . . . ."[87]

Numerous other cases, both before the Supreme Court and in the lower federal courts, evidence a two-tier approach of giving less rigorous review to laws that are arguably based in public moral concerns, and stringent review to laws that are intrinsically religious.[88] By way of illustration, assume that an

84. 449 U.S. 39 (1980) (per curiam) (invalidating a statute requiring posting of the Ten Commandments in public school classrooms).

85. *Id.* at 41-42 (emphasis added).

86. 374 U.S. 203 (1963) (invalidating classroom devotional Bible reading).

87. *Id.* at 224 (emphasis added).

88. Wallace v. Jaffree, 472 U.S. 38, 58 (1985) ("wholly religious character"); Epperson v. Arkansas, 393 U.S. 97, 108 (1968) ("fundamentalist sectarian conviction"); Engel v. Vitale, 370 U.S. 421, 424-25 (1962) ("prayer has always been very religious"); Florey v. Sioux Falls School Dist., 619 F.2d

urban public high school principal receives a student petition of 130 names. Citing increased incidence of teen pregnancy, venereal disease, and AIDS, the petition requests that condom dispensers be placed in the school's bathrooms. The principal thinks this is a good idea and complies. However, the placement of the vending machines soon stirs a big controversy among parents, local religious leaders, Planned Parenthood, and other interest groups. Once the local press picks up the story, the school board is besieged with telephone calls and letters on both sides of the issue. Many parents argue that the presence of the dispensers conveys the message that the school condones premarital sex. Others, including some local clerics, object to the use of artificial contraception, a matter contrary to the clear teaching of their church. Following a long and at times rancorous public meeting, the school board, in a divided vote, orders the vending machines removed. The board's written resolution, drafted by legal counsel, gives as the only reason for the removal that the incident is disrupting the educational environment at the high school. But the prevailing board members said during the meeting that they oppose the dispensers for a variety of reasons, including many of the same concerns cited by the parents and clerics. Assume, further, that a few students and their parents, assembled by a civil liberties organization, sue the school board alleging that conservative religion was the real cause of the board's removal of the dispensers, and that their action thus violates the establishment clause. An injunction is requested directing that the machines again be placed in the bathrooms.

Can we seriously suppose that the Supreme Court would view the dispenser debate as risking an establishment of religion and order the vendors reinstated to the bathroom walls? Surely the Court would say that the school's policy, being a matter not inherently religious, was entirely within the school board's discretion. *Lemon*'s purpose and effect prongs would not be given strict application so as to strike down a policy bearing on student behavior, even though the views of many policymakers on this moral issue were concededly shaped by religion. Moreover, the statements and letters by the parents and local clerics complaining of the condom dispensers would not be admitted into evidence at the trial to show religious purpose behind the school board's decision. First, to admit such evidence would chill the speech and political activity of these

1311, 1314-15 (8th Cir. 1980) ("prayer, by its very nature, is undeniably a religious exercise"), *cert. denied*, 449 U.S. 987 (1981).

religionists. Second, the focus of *Lemon*'s purpose prong would be on the school board's objective purpose in removing the vending machines, not on the motives or purposes of the interested community.[89]

B. *When Law and Religion Coincide*

The Supreme Court has repeatedly affirmed that mere parallelism between the beliefs of a particular religion and legislation does not *ipso facto* make the legislation religious for purposes of the establishment clause.[90] Rules of conduct that are not "inherently religious" include laws against so-called victimless crimes such as gambling, alcoholism, prostitution, obscenity, homosexuality, and adultery. As Justice O'Connor stated in her concurring opinion in *Wallace v. Jaffree*:[91]

> Chaos would ensue if every such statute were invalidated under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.[92]

Likewise, in *Harris v. McRae*,[93] upholding the Hyde Amendment notwithstanding its vigorous support by the Roman Catholic Church, Justice Stewart for the Court said: "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[94]

For strict separationists to equate morally based laws or policies with practices that are commonly thought of as intrinsically religious can lead to some absurd results. It is instructive to use public schools as a way of illustrating this point. Public

89. Corporation of Presiding Bishops v. Amos, 403 U.S. 327, 335 (1987) ("*Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.")

90. *See, e.g.*, Bowen v. Kendrick, 108 S. Ct. 2562, 2571 n.8, 2572-73 (1988); Harris v. McRae, 448 U.S. 297, 319-20 (1980); McGowan v. Maryland, 366 U.S. 420, 442 (1961); *id.* at 462 (Frankfurter, J., concurring in the judgment).

91. 472 U.S. 38, 67 (1985).

92. *Id.* at 70.

93. 448 U.S. 297 (1980).

94. *Id.* at 319.

schools commonly have student behavioral rules against swearing, cursing, or using vulgarity; a dress code that prohibits sexually provocative attire; and authorities commonly make a policy decision not to have a school-based sex counseling and contraception distribution center. Yet, each of these familiar rules and decisions are supported by a community morality derived in large measure from traditional religious teachings. It is absurd to say that the establishment clause should thereby strike down these commonplace rules concerning student morality.[95]

Although no Supreme Court cases address public school policies or practices that implicate morality when challenged as violative of the establishment clause, the lower courts have confronted this situation. A first line of cases involves public school policies regarding sex education and contraception discussion in the curricula, topics that often figure prominently in religious teaching. In *Mercer v. Michigan State Board of Education*,[96] the court held *inter alia* that a state statute prohibiting discussion of birth control in public schools does not violate the establishment clause. Obviously, the teaching ban was the result of conservative religious pressure; still the law did not violate church-state separation. Arguing that the establishment clause also prohibits hostility towards religion, other plaintiffs have brought suits claiming that sex education curricula are hostile to religion and thus violate the establishment clause. These claims have consistently been rejected because sex education is treated as a moral, not a spiritual or creedal matter.[97]

95. *Cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia sodomy law). As Chief Justice Burger said in his concurring opinion, the "[c]ondemnation of [homosexual sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards." *Id.* at 196. But the law's religious underpinnings did not thereby make it violative of the establishment clause.

96. 379 F. Supp. 580, 586 (E.D. Mich.) (three-judge panel), *aff'd mem.*, 419 U.S. 1081 (1974).

97. *See, e.g.*, Cornwell v. State Bd. of Educ., 314 F. Supp. 340, 343 (D. Md. 1969), *aff'd*, 424 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970) (unlike "such overt religious activities" as prayer and Bible reading, school's sex education curriculum not violative of establishment clause even though program "had some religious connection"); Citizens for Parental Rights v. San Mateo Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68, 83-88 (1975); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971); Smith v. Ricci, 89 N.J. 514, 446 A.2d 501, 507, *appeal dismissed sub nom.* Smith v. Brandt, 459 U.S. 962 (1982) (state school board regulation requiring local school districts to develop and implement a family-life education program in the curriculum did not violate the establishment clause). See also Davis v. Page, 385 F. Supp. 395, 402-05 (D.N.H. 1974), where a student health class was objected to by members of the Apostolic Lutheran Church because it

A second line of cases involves public school textbooks and curricula and allege establishment clause violations because the moral content either advanced the religion of secular humanism or was hostile to the religion of fundamentalist Christianity. The court in *Grove v. Mead School District No. 354*,[98] held that the use of a book entitled *The Learning Tree* in an English literature course was not a "religious activity" in the sense pertinent to the establishment clause, and that it neither established secular humanism nor was anti-religious. The court emphasized that the activity at issue in the case was "not a ritual, but students reading,"[99] and was therefore distinguishable from inherently religious activities that had been prohibited in previous cases of the Supreme Court.[100]

A third line of cases in which the courts have refused to hold that morally based ideas and rules establish a religion, concern statutes providing for dismissal or suspension of teachers for engaging in public sexual conduct. Thus, in *National Gay Task Force v. Board of Education of the City of Oklahoma City*,[101] for example, the court rejected an establishment clause challenge to a state statute requiring dismissal of homosexual teachers. Obviously, these state laws have their origin in traditional morality, largely arising from the beliefs of conservative

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invaded the privacy of family relationships, favored birth control, and taught a "humanist philosophy." Establishment and free exercise claims were rejected by the district court. *See generally* Stewart, *The First Amendment, The Public Schools, and The Inculcation of Community Values*, 18 J.L. & EDUC. 23, 79-83 (1989).

98. 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

99. *Id.* at 1534. *See also* Smith v. Board of School Comm'rs, 827 F.2d 684, 693 (11th Cir. 1987) (the mere omission of certain historical facts regarding theistic religion or the absence of a more thorough discussion of the manner in which Christianity shaped modern American society did not convey a message of approval of the religion of secular humanism); Williams v. Board of Educ., 388 F. Supp. 93 (S.D.W.V.) (denying an establishment clause claim regarding the use of books with alleged religious and anti-religious material), *aff'd*, 530 F.2d 972 (4th Cir. 1975).

100. *See also* Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408 (N.D. Ill. 1984) (school practice of allowing military recruiters access to public schools while denying the same privilege to peace activists declared unconstitutional). The school argued that allowing access to a religious peace group would violate the establishment clause. The defense was rejected by the court because the religious group's message was not intrinsically religious. *See generally* Stewart, *supra* note 97, at 80-89.

101. 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.*, 470 U.S. 903 (1985). *See also* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977).

churches, but these religious motivations were held not to cause such laws to violate church-state separation.[102]

C. *"Religion" From Government's Viewpoint*

Another way of looking at the "inherently religious" analysis as part of the *Lemon* test is to ask: In first amendment analysis, whose perceptions should count as to what is intrinsically religious, as contrasted with what is moral or essentially non-religious? The federal courts have struggled with the problem of defining "religion" so as to achieve the different emphases of the free exercise and establishment clauses. The courts cannot adopt a subjective standard to determine what is "inherently religious." America is so religiously diverse that an "eyes of the beholder" test to determine what is "religion" for establishment clause purposes would inexorably result in a paralysis in government. Religious pluralism is so broad that almost anything government does will likely be seen by someone as endorsing or repudiating a religious viewpoint.[103]

In the first edition of his treatise on constitutional law, Laurence Tribe suggested two different definitions of "religion"—a broad and indeterminate definition for free exercise clause purposes, and a narrow definition for establishment clause purposes.[104] Two definitions were thought to be required, for otherwise many religious concerns such as racial equality, social welfare, health care, and criminal laws on vice, could not simultaneously be supported and advanced by the churches and government. However, the word "religion" appears only once in the first amendment and grammatically should receive the same definition for both religion clauses.[105]

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102. *See generally* Stewart, *supra* note 97, at 57-73 (discussing first amendment right of teachers to determine content of classroom presentations).

103. *See, e.g.*, Bollenbach v. Board of Educ., 659 F. Supp. 1450 (S.D.N.Y. 1987) (religious objection to female school bus drivers); Moddy v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (religious objection to mandatory co-ed gym class where children would wear, and see others wearing, gym shorts); Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) (religious objection to use of audio-visual equipment); *see generally* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985).

104. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-31 (1st ed. 1978). In the second edition of his treatise, Professor Tribe rejects the two-definition solution and suggests an approach parallel to the analysis here. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1185-87 (2d ed. 1988).

105. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting):

This seeming paradox is resolved, not by dual definitions of "religion," but by recognizing that the free exercise clause measures "religion" from the religious claimant's viewpoint, while the establishment clause measures a "law respecting . . . religion" from the government's viewpoint. Moreover, it is not only a difference in "viewpoints," but in what is brought before the court for "viewing." The danger which the establishment clause seeks to avoid is not any and all state interaction with religion and religious organizations. That would lead to a radically secular state. Rather, the purpose of the clause is to prevent only state involvement with religion that *may lead* to the sorts of problems encountered when religion is established. While the legal definition of "religion" in the first amendment can remain broad and indeterminate, the necessity of a clear and fixed structure in church-state relations, equally applicable to all religions, requires a single legal standard in drawing the line of separation. That impermissible level of interaction occurs whenever the state involves itself in the core religious matters of worship or the propagation or inculcation of the sorts of beliefs expressed in confessional statements and creeds.[106]

This difference in how the Court deals with the two religion clauses is illustrated by comparing *Sherbert v. Verner*[107] (holding that choice of a particular day of the week as one's sabbath is "religion" for free exercise purposes) with *McGowan v. Maryland*[108] (holding that a state's designation of a particular day of the week as a day of rest is not a "law respecting . . .

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty . . . .

106. This understanding of when a law is "an establishment of religion" is only for purposes for the first amendment. It is not proposed as an adequate or universal theological definition of religion, only as a definition that fulfills constitutional purposes. Each faith is still free to define "religion" for its own purposes in accord with its own understandings. An excellent discussion on the problem of defining religion for first amendment purposes appears in Malnak v. Yogi, 592 F.2d 197, 200-13 (3d Cir. 1979) (Adams, J., concurring in result).

107. 374 U.S. 398 (1963) (upholding free exercise clause claim by Sabbatarian who was denied unemployment compensation because she refused to accept otherwise suitable job entailing Saturday work).

108. 366 U.S. 420 (1961) (holding that Sunday closing legislation, albeit historically religious in purpose, is now primarily a labor regulation that does not violate the establishment clause).

religion" within the meaning of the establishment clause). Similarly, in *Harris v. McRae*[109] a woman's views on the propriety of abortion were treated as "religion" for free exercise purposes,[110] but a law forbidding the federal government to reimburse the cost of abortions under the Medicaid program was nonetheless not held to be a "law respecting . . . religion" for establishment clause analysis.[111]

In summary, the measure of a "law respecting . . . religion" from the government's viewpoint is that the law or policy in question must be "inherently religious," or "clearly religious," or not "arguably secular," *i.e.*, "religious" in the conventional sense of that which is widely regarded as devotional, spiritual, liturgical, or as involving worship, a confession, a creed, or veneration of a deity. In a related context, Justice O'Connor characterizes this issue as a mixed question of law and fact, "in large part a legal question to be answered on the basis of judicial interpretation of social facts."[112] By way of example, Professor Tribe contrasts prayer with meditation.[113] Prayer holds religious significance for most Americans, yet it may not be officially endorsed by government, whereas meditation does not hold religious significance for most people and thus may (absent a wholly religious purpose) be officially endorsed. "In the same way," Tribe suggests, "no plausible establishment clause challenge could be made against the use of the eagle as an official symbol, despite its religious significance to some people; but a decisive challenge could be launched against use of a cross, whose religious significance is clear to nearly all."[114]

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109. 448 U.S. 297 (1980).

110. *Id.* at 319-21. The free exercise clause claim failed in *McRae*, not because a woman's decision to choose to bear a child or obtain an abortion did not flow from a cognizable religious belief, but because none of the plaintiffs had standing to argue the claim.

111. *Id.* at 319-20.

112. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984)). The "social facts" should be drawn broadly from the relevant governmental community, and not focus narrowly on a local community. There are difficult evidentiary problems with a localized "community majority" test of what is "inherently religious." The difficulty would be evident throughout the trial of a case, taking the form of hearsay opinion testimony by lay witnesses concerning the supposed dominant religious beliefs of a local political community. Moreover, from a conceptual standpoint, it hardly makes sense to have a chameleon-like establishment clause that applies differently as the first amendment travels from local community to local community.

113. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1187 (2d ed. 1988).

114. *Id.* One way in which the Supreme Court avoids judicially probing legislative motive is by declining to pursue vigorously establishment clause

D. *Inhibiting Free Speech & Political Participation*

All citizens should be allowed to participate equally in public policy formulation. To exclude those who are informed in their moral vision by a religious faith would deny them freedom of speech and their right to participate in government. Such a state of affairs would leave the domain of public policy formulation to none but the nonreligious, and to those who would conceal the true origins of their moral values. Rather, it would seem that the first amendment is designed so that all have space to speak, publicly and with candor.

The Supreme Court has distinguished between laws that are "inherently religious," on the one hand, and laws that have their origin in tradition, history, or morals, on the other, partly out of recognition that citizens have freedom of speech and the full and equal right to engage in participatory government.[115] Justice Brennan has provided the clearest statement of the Supreme Court's attitude in this regard in *McDaniel v. Paty*:[116]

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."
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> The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by vir-

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analysis where the subject matter of the law or rule in question is not "inherently religious." This directly ties in to the reluctance of the Court to attribute unconstitutional motives to the relevant legislative body, as reflected in the Court's deferential application of the purpose prong of the *Lemon* test. *See supra* text accompanying notes 16-20.

115. *See* L. TRIBE, *supra* note 113, at 1275-84.

116. 435 U.S. 618, 629 (1977) (plurality opinion) (Brennan, J. concurring in the judgment). *McDaniel* involved a Baptist minister's successful challenge to a Tennessee law preventing "Ministers of the Gospel, or priests" from serving in an elected public office.

> tue of their status as such, as subversive of American ideas and therefore subject to unique disabilities. . . .
>
> In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.[117]

It appears that the manner in which the Supreme Court has sought to avoid inhibiting freedom of speech and political participation is to apply greater or lesser rigor in the purpose and effect prongs of *Lemon*, depending on whether the law in question is or is not "inherently religious." Without such an approach, the moral views of religio-political majorities would be restrained from being codified into law. Such a result would be anti-democratic because it would work a *de jure* discrimination adverse to the traditional moral views of the majority in the relevant political community.

III.

It is hard to think of a contemporary legal doctrine that is as besieged from all quarters as is the *Lemon* test. Some of this criticism, I suggest, is targeted on the literal *Lemon* test as stated in 1971, not the evolved *Lemon* test as the Supreme Court applies it at present. Moreover, some have taken aim at the literal test because it makes for an easier target, not because the critic is unaware that *Lemon* has evolved.

Still other criticism is due to the commentator's agenda (sometimes hidden, but often not), and *Lemon* is in the way of achieving that agenda. Elsewhere, I have argued that the chorus of complaints against establishment clause cases is due in considerable measure to the fact that any juridical settlement concerning church-state relations necessarily implicates theological positions.[118] That is to say, the *Lemon* test, however applied, is bound to contradict the deeply held religious beliefs of some, while affirming, or at least coinciding with, the reli-

117. *Id.* at 640-41 (footnotes and citations omitted).

118. *See* Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. 371, 374.

gious beliefs of others. Thus, when the late John Courtney Murray insisted that the first amendment's religion clauses incorporated no "articles of faith," but represented only "articles of peace,"[119] he was, *ipso facto*, making a statement with theological implications about establishment clause jurisprudence.

Critics of the *Lemon* test both in its original and in its evolved forms, have proposed alternative principles to supplant it. Coercion of conscience, equal protection, nonpreferentialism, neutrality, and accommodation are frequently suggested as guides. Reducing the establishment clause to the prevention of *coercion* of religiously based conscience renders the clause's reach coextensive with that of the free exercise clause.[120] Moreover, the Supreme Court has held that coercion is not present when general tax revenues are used to advance the very core activities of religion.[121] That result is unacceptable to nearly everyone. An *equal protection* approach that prohibits discrimination among religions, and as between religion and non-religion, is part of what nonestablishment is about,[122] but does not adequately cover many other possibilities. *Nonpreferentialism* was rejected by the Supreme Court way back in *Everson*,[123] and that holding has been expressly reaffirmed in *McCollum*,[124] *Schempp*,[125] and so on down through the years. While Chief Justice Rehnquist may be persuaded that the first Congress did not intend to bar nonpreferential support for religion,[126] nonpreferentialism is insensitive to the long-term

119. J.C. MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 56 (1964).

120. Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (no free exercise violation in absence of claim that statute in question coerced them as individuals in the practice of their religion); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended"); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.").

121. Tilton v. Richardson, 403 U.S. 672, 689 (1971) (no free exercise claim because plaintiffs were unable to identify any coercion); Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (same).

122. *See* Larson v. Valente, 456 U.S. 228 (1982).

123. 330 U.S. 1, 15 (1947).

124. 333 U.S. 203, 211 (1948).

125. 374 U.S. 203, 216-17 (1963).

126. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

harmful effects[127] that direct government support would inevitably have on the religious "beneficiaries."

Justice O'Connor's "no-endorsement" test,[128] along with its "symbolic link" derivative,[129] has been convincingly discredited by Professor Steven D. Smith.[130] Her description of the "reasonable" or "objective observer" who is to apply the test sounds autobiographical. It is really just a variant on the *neutrality* ideal. The aspirational goal of governmental *neutrality* has no substantive content of its own, thus requiring reference to some other controlling principle to establish a baseline for comparing proposed state action against the possibility of inaction.[131] Except as to parochial aid, heretofore the Court has required empirical or other palpable evidence before finding the effect prong of *Lemon* violated. What O'Connor's no-endorsement test does (at least as to religious symbols) is to permit this "objective observer" to play the role of expert social scientist measuring by "eyeball" the normative community reaction to the public display of a symbol and announce whether it endorses or disapproves of religion.

Like Justice Brennan's "abc" test,[132] advocated when he was still relatively new to the church-state debate, Justice O'Connor's "no-endorsement" approach has not been

127. *See* Esbeck, *Religion and A Neutral State: Imperative or Impossibility?* 15 CUMB. L. REV. 67, 81-85 (1984-85) (The harmful effects are these: We presuppose genuine religion springs from persuasion rather than being a by-product of privilege; the state has no competence in matters of faith, and to imply that it does uncritically exalts the state; religion becomes captive of culture, soon reduced to civil religion; and the agencies of the church risk being subverted to ends chosen by the state).

128. *See* Wallace v. Jaffree, 472 U.S. 38, 68-79 (1985) (O'Connor, J., concurring in the judgment); Lynch v. Donnelly, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring).

129. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 390 (1985). *Compare with* Bowen v. Kendrick, 108 S. Ct. 2562, 2576 (1988) (rejecting a "symbolic link" argument on given facts).

130. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987).

131. *See* D. FELLMAN, RELIGION IN AMERICAN PUBLIC LAW 108-10 (1965).

132. Abington Township School Dist. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring):

> [T]he Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice.

Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (Brennan, J., concurring) (same).

adopted *in toto* by other members of the Court—although there have been flirtations with "endorsement" language in a supporting role or as "make weight" for results reached under other principles.[133] Like Justice Brennan's "abc" test, Justice O'Connor's enthusiasm for her "no-endorsement" approach will hopefully abate and it can be forgotten.

Finally, there is *accommodationism.* In discussing church state relations, the label "accommodationism" is often used as shorthand for the most plausible alternative to those holding a 'separationist' theory. The term "accommodationist" is disarming of potential critics, for it feigns benign intent by suggesting that all that is asked for is a little breathing space from an affirmative, smothering state. However, what little doctrinal clarity there is in this area would be better served if use of the word "accommodation" was abandoned.

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133. Smith, *supra* note 130, at 275 (1987). *Compare with* Bowen v. Kendrick, 108 S. Ct. 2562, 2572-73 (1988) (rejecting an "endorsement" argument on given facts). *But see* County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989), holding that a Christmas nativity scene displayed on the staircase of a county courthouse violated the establishment clause, whereas a Hanukkah menorah displayed alongside a Christmas tree and sign saluting liberty outside a city-county building did not violate the establishment clause. The Court did not reject the three-part *Lemon* test. Rather, five of the Justices (Brennan, Marshall, Blackmun, Stevens and O'Connor) applied the endorsement test as one that "refined" *Lemon*'s effect prong insofar as it disallows governmental action that advances religion. *Id.* at 3098-3101 (Part III-A of Justice Blackmun's opinion). The Court said that it need not consider at this time whether the endorsement test also modified or "refined" the purpose and entanglement prongs of the *Lemon* inquiry. *Id.* at 3101 n.45. In proceeding to apply this accretion to the effect analysis, the same five Justices were in agreement that the county's crèche display failed the test. *Id.* at 3103-05 (Part IV of Justice Blackmun's opinion). However, when it came to the Hanukkah menorah display, only two of these five Justices reached the conclusion that the endorsement test was not violated; indeed, even these two Justices did not agree on the same formulation of the endorsement test inquiry. *Id.* at 311-15 (Part VI of Justice Blackmun's opinion); *Id.* at 3122-24 (Part III of Justice O'Connor's opinion). Thus, it took the vote of the four dissenting Justices to reach the result that the menorah display was constitutional. *Id.* at 3134-46 (Kennedy, J., dissenting, joined by Rehnquist, C.J., White and Scalia, J.J.). Moreover, while finding the Christmas nativity display violative of the endorsement test, the five-judge majority did not overrule the result in *Lynch v. Donnelly* which upheld a Christmas crèche displayed in a different context. It appears self-evident that the Supreme Court's helter skelter result and inability to apply the endorsement test in any consistent manner, demonstrates its disutility. By eschewing broad principles of law, and by using in their placed the endorsement test and its attendant myth of an "objective observer," the Court becomes ensnared in micro-managing the numerous occurrences of governmental acknowledgement of religion.

First, reliance upon a doctrinal test that hinges on the word "accommodation" is almost useless in legal argument. The word is too malleable to be of utility in making the difficult distinctions required in establishment clause cases. Although subject to varying interpretations and always vulnerable to distortion, at least words like "strict separationism," "institutional separationism," "nonpreferentialism," "equal protection," "equal access," and "coercion of conscience" carry some content that suggest a beginning point in one's legal analysis. The same cannot be said for the word "accommodation." If use of the term "accommodation" could be confined to that narrow range of instances when government enacts an exemption from general regulation or taxation for religious activity, (although no exemption is required by the free exercise clause),[134] then the term would mean nothing more than the legal conclusion that the exemption—while not a duty imposed by the free exercise clause—does not violate a duty imposed by the establishment clause. However, it is not clear that there are many such cases. For reasons of religious liberty, we should uphold the view that the exemptions of *Walz*, *Catholic Bishop*, and *Amos*,[135] for example, are required by the first amendment. Still, if "accommodation" were used in this limited sense, there would not be a major problem. But the term cuts a far broader swath.

Second, if taken literally, the word "accommodation" would be detrimental to religious rights. Just as the term "toleration" suggests that government is patronizing minority religions by choosing to afford them religious freedom, the term "accommodation" suggests that government has graciously elected to grant religious freedom in a given situation. In speaking of the first amendment, it promotes clarity to think in terms of individual and communal *rights* to religious liberty, and the state's *duties* and *authority*.

Third, depending upon the author and the audience, the term "accommodation" is used so indiscriminately that at one time or another all but the strictest of separationists fall within

134. *See* Adams & Gordon, *The Doctrine of Accommodation in The Jurisprudence of the Religion Clauses*, 37 DE PAUL L. REV. 317 (1988).

135. *See supra* text accompanying notes 48-52. *But see* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (plurality opinion). *Texas Monthly* strikes down a state sales and use tax exemption that applied only to religious literature sold by religious organizations. Although there was no majority opinion, five Justices held that the narrow exemption violated the establishment clause. However, these same Justices all indicated that an exemption that benefited a broader class of nonprofit organizations would be constitutionally permissible.

its sweep. The use of "accommodation" in this highly obscurantist way can cause those who do not identify with strict-separationism to fail to distinguish themselves from those advancing some other agenda under the banner of accommodationism. This gives the perception that accommodationism has more supporters than is the case.

Fourth, if what accommodationists want is nonpreferential government support of religion, then why not call it that? In fairness, some do. As to the rest, the reason may be that accommodationists fear rejection from a public not yet prepared to accept nonpreferentialism. To adopt nonpreferentialism would work a sea of change in current legal doctrine. This would be true even if nonpreferentialism was redefined as requiring the state to be more inclusive, thus requiring all similarly situated organizations, both secular and religious, to be equally assisted by government funding.

As to all of these suggested controlling principles—offered as would-be usurpers of the *Lemon* test as it has evolved—the law's inherent reluctance to embrace something new is captured in the maxim, *Better to live with the devil we do know, than the devil we don't.*